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IN THE

Supreme Court of the United States

HOFFMAN PLASTIC COMPOUNDS, INC.,

Petitioner,

— v. —

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICI CURIAE* OF EMPLOYERS AND EMPLOYER ORGANIZATIONS IN SUPPORT OF RESPONDENT

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Greater Blouse, Skirt, Undergarment & Sportswear Association, Inc.

Levi Strauss & Co.

Industrial Association of Juvenile Apparel Manufacturers, Inc.

National Association of Blouse Manufacturers

New York Skirt and Sportswear Association, Inc.

Nicole Miller, Inc.

Plastic and Metal Products Manufacturing Association

San Francisco Small Business Advocates

San Francisco Small Business Network

Small Manufacturers Association of California

The United States Hispanic Chamber of Commerce

U.S.-Mexico Chamber of Commerce

Work in America Institute, Inc.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICI CURIAE 1

STATEMENT OF THE CASE 7

SUMMARY OF ARGUMENT 8

ARGUMENT 10

I. THE LEGAL ANALYSIS OF THE SOLICITOR GENERAL IS CORRECT 10

II. FAIR COMPETITION REQUIRES THE UNIFORM APPLICATION OF REGULATORY STANDARDS 10

A. Regulation Imposes Costs That Must Be Applied Evenly for Competition to Be Fair 11

B. The Competitive Significance of Even Regulatory Costs Is Well Documented 14

C. The Even Application Of Labor Regulations Is Particularly Significant In Competitive, Labor-Intensive Industries with Low Profit Margins 17

III. FAIR COMPETITION IS A CONGRESSIONAL GOAL OF THE LABOR AND IMMIGRATION LAWS 23

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

ABF Freight Sys., Inc. v. NLRB,
510 U.S. 317 (1994) 22

A.P.R.A. Fuel Oil Buyers Group, Inc.,
320 N.L.R.B. 408, 1995 WL 803434 (Dec. 21, 1995) 28

Chesapeake Bay Found. v. Gwaltney,
611 F. Supp. 1542 (E.D. Va. 1985) 15

Commercial Cleaning Services v. Colin Serv. Sys.,
-- F.3d --, No. 00-7571, 2001 WL 1426953
(2d Cir. Nov. 15, 2001) 20

Contreras v. Corinthian Vigor Ins. Brokerage, Inc.,
25 F. Supp. 2d 1053 (N.D. Ca. 1998) 30

Local 512, Warehouse and Office Workers' Union v. NLRB,
795 F.2d 705 (9th Cir. 1986) 30

McKennon v. Nashville Banner Publ'g Co.,
513 U.S. 352 (1995) 22

National Licorice Co. v. NLRB,
309 U.S. 350 (1940) 23

NLRB v. Apollo Tire Co., Inc.,
604 F.2d 1180 (9th Cir. 1979) 22

NLRB V. A.P.R.A. Fuel Oil Buyers Group, Inc.,
134 F.3d 50 (2d Cir. 1997) 29, 30

Patel v. Quality Inn South,
846 F.2d 700 (11th Cir. 1988) 21, 30

Sure-Tan, Inc. v. NLRB,
467 U.S. 883 (1984) 29

United States v. Mac's Muffler Shop, Inc.,
Civ. A. No. C85-138R, 1986 WL 15443
(N.D. Ga. Nov. 4, 1986) 15

United States v. Mun. Auth.,
150 F.3d 259 (3d Cir. 1998) 14, 15

RULES AND STATUTES

Clean Water Act,
33 U.S.C. § 1319 (2001) 14

Fair Labor Standards Act of 1938
ch. 676, § 2, 52 Stat. 1060 (1938) 16

Fair Labor Standards Act ("FLSA")
29 U.S.C. § 201 *et seq.* (2001) 12, 16
29 U.S.C. § 203 (2001) 17
29 U.S.C. § 216(b) (2001) 27

Federal Trade Commission Act
15 U.S.C. § 45 (2001) 16

Immigration Reform and Control Act of 1986 § 111(d),
Pub. L. No. 99-603, 100 Stat. 3359 27

Immigration Reform and Control Act of 1986 ("IRCA")
8 U.S.C. § 1324a *et seq.* (2001) 12
8 U.S.C. § 1324a (2001) 24, 27

National Labor Relations Act ("NLRA")
29 U.S.C. § 151 *et seq.* (2001) 7
29 U.S.C. § 152 (2001) 17, 24

Occupational Safety and Health Act
29 U.S.C. § 651 *et seq.* (2001) 12

United States Supreme Court Rule
SUP. CT. R. 37 1

OTHER AUTHORITIES

132 Cong. Rec. H10584 (Oct. 15, 1986) (remarks of Rep. Lungren, Ranking Member of the House Immigration Subcommittee of the House Judiciary Committee, made immediately prior to the final vote on IRCA on October 15, 1986) 27

64th Annual Report of the National Labor Relations Board, for the Fiscal Year Ended September 30, 1999 13

Alan Barkema, et al., *The New U.S. Meat Industry, in* FEDERAL RESERVE BANK OF KANSAS CITY, ECONOMIC REVIEW 33 (2001) (available at www.kc.frb.org/Publicat/econrev/PDF/2q01bark.pdf) 19

George J. Borjas, et al., *How Much Do Immigration and Trade Affect Labor Market Outcomes?*, in BROOKINGS PAPERS ON ECONOMIC ACTIVITY, NO. 1 (Brookings Institute 1997) 18

Calculation of the Economic Benefit of Noncompliance in EPA's Civil Penalty Enforcement Cases, Notice, 64 Fed. Reg. 32,948 (June 18, 1999) 15

Closing the Back Door – The Need for Employer Sanctions, in Staff Report of the Select Commission on Immigration and Refugee Policy 559 (U.S. Immigration Policy & the National Interest Apr. 30, 1981) 18

Statement of Ann L. Combs, Assistant Secretary of Labor for Pension and Welfare Benefits, et al., Congressional Testimony before U.S. House Subcommittee on Labor, Health and Human Services and Education, Committee on Appropriations (May 23, 2001) (available at www.dol.gov/_sec/media/congress/052301workpro.htm) 18

W. Mark Crain & Thomas D. Hopkins, *The Impact of Regulatory Costs on Small Firms*, RFP No. SBAHQ-00-R-0027 (U.S. Small Bus. Admin. 2001) 12, 13

Economy and Efficiency in Government Procurement Through Compliance With Certain Immigration and Naturalization Act Provisions, 61 Fed. Reg. 6,091 (Feb. 13, 1996) (Exec. Order No. 12,989) 28

Editorial, *Limited Amnesty for Immigrants*, CHICAGO TRIBUNE, Aug. 6, 2001 10

EEOC Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws, Number 915.002, *in* EEOC COMPLIANCE MANUAL § 622, App. B (Oct. 26, 1999) 28

Environmental Protection Agency, ENVIRONMENTAL INVESTMENTS: THE COST OF A CLEAN ENVIRONMENT 2-1 (1990) 14

EPA: Incentives for Self-Policing: Discover, Disclosure, Correction, and Prevention of Violations, Notice, 60 Fed. Reg. 66,706 (Dec. 22, 1995) (final policy statement) 15

EPA Science Advisory Board, Notification of Public Advisory Committee Meetings, 66 Fed. Reg. 19,770 (Apr. 17, 2001) 15

Statement of John R. Fraser, Deputy Administrator Wage and Hour Division Employment Standards Administration U.S. Department of Labor Before the Subcommittee on Immigration and Claims of the House Judiciary Committee (July 1, 1999), *available at* www.house.gov/judiciary/fras0701.htm 28

General Accounting Office, GARMENT INDUSTRY: EFFORTS TO ADDRESS THE PREVALENCE AND CONDITIONS OF SWEATSHOPS (Nov. 1994) 19

H.R. Rep. 98-115 (I) (Statement of Robert W. Searby, Deputy Under Secretary for International Labor Affairs, Dep't of Labor (Mar. 16, 1983) 26

H.R. Rep. No. 99-682 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649 ..... 24, 26

JOSEPH JOHNSON, A REVIEW AND SYNTHESIS OF THE COST OF WORKPLACE REGULATIONS (Regulatory Studies Program, Mercatus Center, George Mason University, Working Paper, Aug. 2001) 12

Thomas G. Krattenmaker and Steven C. Salopp, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L.J. 209 (1986) 11

NANCY HOMEL MONTWEILER, THE IMMIGRATION REFORM LAW OF 1986 (BNA 1986) 27

Letter from James C. Miller III, FTC Chairman, to the Hon. John D. Dingell, Chairman, U.S. House Committee on Energy and Commerce entitled "FTC Policy Statement on Deception," n.58 (Oct. 14, 1983) (available at http://www.ftc.gov/bcp/policystmt/ad-decept.htm) 16

Memorandum of Understanding Between the Immigration and Naturalization Service Department of Justice and the Employment Standards Administration Department of Labor, Nov. 23, 1998, *reprinted in* 227 DAILY LAB. REP. E. (Nov. 25, 1998) 28

Press Release, FTC Chairman Steiger Stresses Uniform Law Enforcement to Protect Both Consumers and Competition (Mar. 18, 1992) (available at http://www.ftc.gov/opa/predawn/F93/jds-dalla4.htm)..... 16

Statement of Joe Razo, Director, Concentrated Enforcement Program, Division of Labor Standards Enforcement, U.S. Department of Labor Before the Select Commission on Immigration and Refugee Policy, Feb. 5, 1980, *in* Staff Report of the Select Commission on Immigration and Refugee Policy; App. E, Supplement to the Final Report and Recommendations of the Select Commission on Immigration and Refugee Policy 243 (April 30, 1981). ... 25

Bernard D. Reams, Jr. and Mary Ann Nelson, *Immigration Reform And The Simpson-Rodino Act: A Legislative History Of The Immigration Reform And Control Act Of 1986 (P.L. 99-603) With Related Documents And Secondary Sources*, 22 INT'L J. LEGAL INFO. 12 (1994) 25

Cindy Rodriguez, *For Labor Activists, Unlikely Alliance*, THE BOSTON GLOBE, May 2, 2001, at B1 10

S. Rep. 99-132 (1985) 26

Philip Saunders Jr., *Civil Penalties and the Economic Benefits of Noncompliance: A Better Alternative for Attorneys than EPA's BEN Model*, 22 ENVTL. L. Rep. 10003 (Jan. 1992). 11

Richard B. Stewart, Symposium, *Environmental Regulation and International Competitiveness*, 102 YALE L.J. 2039 (1993) 14

U.S. Department of Labor, A PROFILE OF U.S. FARM WORKERS: DEMOGRAPHICS, HOUSEHOLD COMPOSITION, INCOME, AND USE OF SERVICES 1-5 (1997) 19

U.S. Immigration & Naturalization Serv., THE TRIENNIAL COMPREHENSIVE REPORT ON IMMIGRATION (1999) 10

Harry Valetk, *"I Cannot Eat Air!": An Economic Analysis of International Immigration Law For The 21st Century*, 7 CARDOZO J. INT'L & COMP. L. 141 (1999) 19

Harry Weiss, *Economic Coverage of the Fair Labor Standards Act*, 58 Q. J. ECON. 460 (1944) 17

Aaron Zitner, *Immigrant Tally Doubles in Census Count: U.S. has Twice As Many Undocumented Workers as Estimate*, LOS ANGELES TIMES, Mar. 10, 2001, at A1 10

This brief *amici curiae* is submitted on behalf of employers, industry associations, business networks, chambers of commerce, organizations of small manufacturers, and a business-labor coalition (collectively, the "Employer Organizations") to urge affirmance of the *en banc* decision of the United States Court of Appeals for the District of Columbia Circuit.[1]

INTEREST OF THE *AMICI CURIAE*

Amici and their members engage in business in a wide range of United States industries, including sectors that employ significant numbers of recent immigrants and other low-wage workers. *Amici* and their members include more than 45,000 companies located across the country.

This case arises against a backdrop of myriad federal and state laws governing labor relations, terms and conditions of employment, and immigration policy, each of which directly regulates the actions of *amici* and their members. The Employer Organizations have a vital interest in the outcome of this case, because the uniform application of legal rules to all employers is essential to the maintenance of a level playing field upon which *amici* can fairly compete.

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[1] Counsel for *amici curiae* authored this brief in its entirety. No person or entity made a monetary contribution to the preparation or submission of the brief. *See* SUP. CT. R. 37.6. Further, the Office of the Solicitor General, on behalf of the Respondent, and counsel for Petitioner Hoffman have granted consent for *amici curiae* to file this brief pursuant to SUP. CT. R. 37.2(a). *See* Letter from Sol. Gen. Theodore B. Olson to Jeffrey H. Drichta dated Dec. 6, 2001; Letter from Jeffrey H. Drichta to Maurice Baskin dated Nov. 27, 2001. Original copies of these consent letters have been filed with the Clerk of the Court contemporaneously with this brief.

Amici Employer Organizations have a powerful stake in assuring the imposition of consistent sanctions against any employer who attempts to reduce costs by skirting the law by, for instance, ignoring health, safety, environmental, consumer protection, wage and hour, or antidiscrimination laws, or by evading the requirements of the National Labor Relations Act ("NLRA") that are at issue here.

Amici Employer Organizations hold differing views about the appropriate types and levels of government regulation of business, and many *amici* are active in efforts to reform these costly and often inefficient rules. Nevertheless, the Employer Organizations and the companies they represent are responsible corporate citizens who endeavor to comply with the Nation's laws and business regulations as written, and whose businesses would be threatened by the increased, unfair competition from less responsible employers that would result if this Court reversed the holding below.

The amici Employers and Employer Organizations are:

American Nursery and Landscape Association ("ANLA"), founded in 1875, representing agricultural, service, and retail businesses that grow, sell, and use landscape plants. ANLA's 2,300 active member firms produce an estimated seventy-five percent of the United States' landscape plant material. Through the membership of state and regional associations, ANLA represents an additional 15,000 small and family farms and businesses. ANLA's chief purpose is to advocate the industry's interests before government on labor, employment, tax, environmental, trade, and related business issues. The wholesale value of nursery and greenhouse plants produced annually is estimated to exceed $12 billion. The industry employs an estimated 600,000 to 750,000 workers during

peak seasons. Greater than fifty percent of the peak-season workforce is believed to consist of immigrants.

Associated Corset and Brassiere Manufacturers, Inc., founded in 1933, representing girdle and brassiere manufacturers. The Association's members employ sample makers, cutters, sewing machine operators, and distribution workers. The clothing they produce is sold to large national department stores, discount stores, mail order houses, and specialty stores throughout the United States. Members are parties to collective bargaining agreements that require them to maintain high standards of wages and shop conditions.

Greater Blouse, Skirt, Undergarment & Sportswear Association, Inc., an association of contractors in New York's garment industry. Established in 1933, the members of the association are small to medium size entrepreneurs who produce garments for major jobbers and manufacturers in the industry. Most of the workers in this industry are recent immigrants. The membership of the association has declined in recent years because of severe competition from sweatshop contractors who constantly violate labor and other laws of the workplace.

Levi Strauss & Co. ("LS&CO"), one of the world's largest brand-name apparel manufacturers and marketers with sales in more than eighty countries. LS&CO products are sold under the Levi's®, Dockers®, and Slates® brands. LS&CO was founded in 1873 by Levi Strauss and Nevada tailor Jacob Davis. Today, the Levi's® trademark is one of the most recognized in the world and is registered in more than 160 countries. The company is privately held by descendants of the family of Levi Strauss.

Industrial Association of Juvenile Apparel Manufacturers, Inc., formed in 1936 to represent employers in the garment industry who specialize in the production of children's apparel and swimwear. The Association's

members have entered into collective bargaining agreements since its founding. The items they produce are sold to children's wear shops and to department stores like Wal-Mart, Kmart, and Sears. Members face stiff competition from contracting shops that engage in low-wage production.

National Association of Blouse Manufacturers, founded in 1933 to represent a number of women's clothing manufacturers in their labor relations, public relations, industry promotion, and governmental affairs. Its members have their merchandise produced in contracting shops that employ workers covered by collective bargaining agreements. Maintaining decent workplace standards is an important goal of the association and its members.

New York Skirt and Sportswear Association, Inc., founded in 1933 and representing manufacturers and jobbers who produce women's sportswear at their own facilities or in contracting shops. Members of the association supply their merchandise to major retail stores like Macy's, JC Penney, Kmart, and Sears. More than 15,000 workers (largely recent immigrants) are employed by contractors who produce garments for members of the association. Members face unfair competition from contractors who ignore labor, health, and safety standards.

Nicole Miller, Ltd., a world-class apparel design company. Nicole Miller designs for men and women are found in fine specialty retailers like Neiman Marcus, Saks Fifth Avenue, Bloomingdale's, Lord & Taylor, as well as over 1,200 boutiques across the United States. In a recent survey, eight out of ten women in the United States between the ages of twenty-five and fifty recognized the Nicole Miller brand. In addition to manufacturing, Nicole Miller owns and operates thirty retail boutiques.

Plastic and Metal Products Manufacturing Association, founded in 1936 to represent management in industrial relations, quality control, and workplace

environment issues. The association represents over 100 manufacturers of small plastic items. Association members abide by union contracts that guarantee minimum union standards and conditions. The members collectively employ over 8,000 workers, and they are vulnerable to competition from manufacturers who pay substandard wages.

San Francisco Small Business Advocates ("SFSBA"), a group of executives of small businesses based in San Francisco who operate on a national basis. The purpose of SFSBA is to advocate for small business on public policy issues on the local, state, and national levels. Among other initiatives, the organization has focused on energy policy in California and the implementation of the Workforce Investment Act in California and San Francisco.

San Francisco Small Business Network ("SFSBN"), founded in 1984 and comprised of nineteen diverse member organizations representing 19,000 small businesses. Member firms range from professional societies to nonprofit resource centers, from ethnic chambers of commerce to neighborhood business alliances. SFSBN advocates for legislation that promotes the success of small businesses and supports appointments of small business leaders to prominent policymaking positions, among other activities.

Small Manufacturers Association of California, a statewide association headquartered in Glendale, California, representing approximately 10,000 small manufacturing companies in California. The grass roots organization provides advocacy aimed at retaining and supporting the manufacturing base, and preserving manufacturing jobs, in the most populated state in the Nation.

The United States Hispanic Chamber of Commerce ("USHCC"), the preeminent Hispanic organization dedicated to representing, promoting, and advocating for the 1.2 million Hispanic owned businesses in the U.S. and Puerto Rico. In addition to actively promoting the economic

growth and development of Hispanic businesses, the USHCC serves as the umbrella organization for 200 local Hispanic chambers nationwide.

U.S.-Mexico Chamber of Commerce ("USMCOC"), a 501(c)(6), non-profit business association chartered in Washington, D.C. by distinguished Mexican and U.S. businessmen, with fifteen offices in the United States and seven offices in Mexico. Since 1921, the USMCOC has been fostering business, investment, and trade relationships between the United States and Mexico. The USMCOC represents more than 2,000 businesses in the United States and Mexico.

Work in America Institute, Inc., a non-partisan, not-for-profit organization dedicated to the advancement of productivity and quality of working life, and to promoting partnership between management and labor. Governed by a tri-partite Board of Directors representing major corporations, international labor unions, and the public sector, the Institute conducts research and produces public events in support of its mission. Since its founding in 1975, the Institute has served over 400 different organizations through its membership arm.

STATEMENT OF THE CASE

The background of this case is set forth fully in the briefs of the parties. Certain undisputed facts, however, underscore the importance of this case to fair business competition:

1. Petitioner Hoffman Plastic Compounds, Inc. ("Hoffman") does not dispute that it violated the NLRA, 29 U.S.C. § 151 *et seq*. (2001) and engaged in illegal layoffs. *See* Pet. App. at 6a.
2. Hoffman does not contest that one of the illegally laid-off workers had indicated on his employment application that he was not authorized to work in the United States. *See* Pet. App. at 94a-95a, n.10.
3. In fashioning a remedy for Hoffman's violation of the law, Respondent, the National Labor Relations Board ("the Board"), ruled that Hoffman was not required to reinstate this undocumented employee. *See* Pet. App. at 82a-83a.
4. The Board awarded the same type of backpay relief that it routinely awards in other cases where the NLRA is violated -- in this case, applying the after-acquired evidence rule to limit backpay to the period from the date of the unlawful layoff until the date when the worker testified that he was an undocumented immigrant. *See* Pet. App. at 94a-95a.

As discussed below, reversing the relief granted, on these facts, would provide law-breaking employers such as Hoffman an unfair competitive advantage over those who obey the law, a result that Congress specifically intended to avoid.

SUMMARY OF ARGUMENT

The rule urged by Petitioner Hoffman would be bad for business.

Fair competition would suffer if the decision below were reversed. *Amici* are law-abiding employers who honor labor and immigration laws, even as they strive to reform these regulations to reflect better sound business policy. Although many employers specifically object to backpay as a remedy for unlawful discharge under the NLRA, *amici* believe that as long as federal labor law recognizes backpay as a remedy, it would be folly to *carve out* an exception that exempts employers of undocumented immigrants from all backpay liability. Such an exemption would grant an unfair competitive advantage to outlaw "sweatshops" and other scofflaw businesses that hire undocumented workers, particularly in cost-sensitive, labor-intensive industries that depend upon low-skilled workers. It would advantage law breakers at the expense of law abiders. Eliminating backpay liability would also unfairly absolve the employer, alone, from responsibility, in a situation where both the employer and the employee have engaged in unlawful behavior -- a particularly inappropriate outcome in light of the significant adverse impact such a holding would have on business competition.

Fair competition was an objective of Congress when it adopted the specific labor and immigration laws at issue. The agencies that implement these statutes and the federal courts that interpret them have construed the laws to safeguard fair business competition as Congress intended. The decision below is consistent with these precedents. A contrary ruling that exempts employers of undocumented workers from the ordinary backpay liability that other employers face would undercut this Congressional objective. Given the framework of extensive government regulation of the workplace, *amici* caution the Court to refrain from

endorsing the message that businesses violating federal laws or regulations may compete unfairly with those who obey them.

ARGUMENT

I. THE LEGAL ANALYSIS OF THE SOLICITOR GENERAL IS CORRECT

Amici endorse the Solicitor General's reconciliation of federal labor and immigration statutes and their proper application to the facts of this case. For the reasons set forth below, *amici* contend that sound business policy also favors the construction of the relevant statutes that the Solicitor General advances.

II. FAIR COMPETITION REQUIRES THE UNIFORM APPLICATION OF REGULATORY STANDARDS

Fundamental principles of economics and fair competition weigh heavily against the creation of an exemption for employers of undocumented workers from ordinary backpay liability. Although estimates vary, there may be as many as thirteen million undocumented persons in the United States today, nearly all of working age,[2] and the NLRA should apply uniformly to all companies that employ them.

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[2] *Compare* U.S. Immigration and Naturalization Serv., THE TRIENNIAL COMPREHENSIVE REPORT ON IMMIGRATION, 56 (1999) (estimating undocumented population at 4.6 to 5.4 million as of 1996), *with* Editorial, *Limited Amnesty for Immigrants*, CHICAGO TRIBUNE, Aug. 6, 2001 (estimating undocumented population at six million), *and* Cindy Rodriguez, *For Labor Activists, Unlikely Alliance*, THE BOSTON GLOBE, May 2, 2001, at B1 (eleven million in 2000), *and* Aaron Zitner, *Immigrant Tally Doubles in Census Count: U.S. Has Twice As Many Undocumented Workers As Estimated*, LOS ANGELES TIMES, Mar. 10, 2001, at A1 (thirteen million in 2000).

A. Regulation Imposes Costs That Must Be Applied Evenly for Competition to Be Fair

Basic economics teaches that a firm with a lower cost structure, over time, will be more successful than a firm with a relatively higher cost structure (all other factors being equal), in any price-competitive industry. With a lower cost structure, the successful firm will choose between matching the prices of the higher-cost firm (and achieving a lower overall market share) or undercutting prices (and achieving a higher overall market share). Either choice will result in higher revenues/profits for the low-cost firm relative to the high-cost firm.[3]

This economic principle holds true whether the successful firm achieves lower costs through greater efficiency or by evading costs of regulatory compliance. As one commentator has explained, the

> [d]irect benefits [of avoiding regulatory compliance] may be retained with the [firm]; alternatively they may be passed on [to] the customers in the form of lower prices. Either way they may produce indirect benefits in terms of product enhancement, increased market share, or other factors that affect profitability.[4]

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[3] *See, e.g.*, Thomas G. Krattenmaker and Steven C. Salopp, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L.J. 209, 224 (1986) (noting that raising a rival's costs can be a particularly effective strategy that need not entail either a short-term sacrifice in profits or classical market power in order to succeed).

[4] Philip Saunders Jr., *Civil Penalties and the Economic Benefits of Noncompliance: A Better Alternative for Attorneys Than EPA's BEN Model*, 22 ENVTL. L. REP. 10003 (Jan. 1992).

When one firm gains a cost advantage by avoiding regulations, other existing competitors will suffer a systemic competitive disadvantage as a result, and will be forced either to exit the market or to adopt similar illegal tactics to replicate the lower cost structure of the successful firm in a perverse "race to the bottom" scenario.

Federal and state regulations impose significant costs on American companies that comply with the laws. By one estimate, federal regulations imposed an $843 billion cost of compliance on the American economy last year.[5] If so, this burden represents roughly eight percent of the Gross Domestic Product, or $8,164 for every American household.[6]

Federal workplace regulations -- including the NLRA, Immigration Reform and Control Act of 1986 ("IRCA"),[7] Fair Labor Standards Act ("FLSA"),[8] and Occupational Safety and Health Act,[9] -- are estimated to have imposed a cost on United States businesses of roughly $779 per employee in 2000.[10] Taking just unfair labor

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[5] *See* W. Mark Crain & Thomas D. Hopkins, *The Impact of Regulatory Costs on Small Firms*, RFP No. SBAHQ-00-R-0027, at 1 (U.S. Small Bus. Admin. 2001).

[6] *Id.*

[7] 8 U.S.C. § 1324a *et seq.* (2001).

[8] 29 U.S.C. § 201 *et seq.* (2001).

[9] 29 U.S.C. § 651 *et seq.* (2001).

[10] *See* Crain & Hopkins, *supra*, at 3. According to another study, in 2000 the direct cost to the United States economy of compliance with the NLRA alone was between $3.95 and $30 billion. *See* JOSEPH JOHNSON, A REVIEW AND SYNTHESIS OF THE COST OF WORKPLACE REGULATIONS 19 (Regulatory Studies Program, Mercatus Center, George Mason University, Working Paper Aug. 2001).

practice cases closed by the NLRB, in 1999, the most recent year for which figures are available, employers paid more than $58 million in backpay to 22,669 employees, or roughly $2,600 per employee.[11] On average, small businesses (firms with fewer than twenty employees) face an annual burden from workplace regulations of an estimated $829 per employee, while large businesses (firms with more than 500 employees) face a cost of $698 per employee.[12]

Although *amici* seek to reform or eliminate many of these regulatory burdens -- including specifically the backpay remedy the Board may impose under the NLRA -- so long as such laws and regulations are in place, the costs of regulatory compliance must be borne evenly for competition to be fair. From an economic perspective, firms that avoid the costs of workplace regulation become lower-cost firms that, over time, will win in their competition against firms that obey the laws and thereby become higher-cost firms. Therefore, a precondition to any coherent set of workplace regulations in a competitive market economy must be equal application of the regulatory burden, in order to avoid advantaging law-breakers over law-abiders.

Simply put, uneven enforcement creates unfair economic advantages for those firms that, for whatever reason, are not required to comply with this Nation's regulatory regime. Whether a regulation is wise or foolish, so long as it is on the books, all employers should equally be required to obey it as a precondition to participation in the American economy.

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[11] *See* 64th Annual Report of the National Labor Relations Board, for the Fiscal Year Ended September 30, 1999, at 113, Table 4.

[12] *See* Crain & Hopkins, *supra*, at 3.

B. The Competitive Significance of Even Regulatory Costs Is Well Documented

Congress, federal agencies, and the courts have recognized, in a variety of contexts, the principle that uneven enforcement of regulations will foster unfair competition. All three branches of government have acted to shape regulatory regimes so as to avoid unfair, discriminatory exemptions such as Hoffman now seeks to create.

To take one typical example, companies that fail to comply with the Nation's extensive environmental laws plainly obtain an economic benefit from doing so – sometimes achieving a considerable advantage over their competitors.[13] To avoid such an unfair advantage and maintain a " 'level . . . economic playing field,' "[14] Congress delegated to the Environmental Protection Agency ("EPA") and the courts the authority to recover from a violator any economic benefit obtained.[15] As a result:

> A cornerstone of the EPA's civil penalty program is recapturing the economic benefit that a violator may have gained from illegal activity. Recapture helps level the playing field by preventing violators from obtaining an unfair financial advantage over their competitors who made the necessary expenditures for environmental compliance.[16]

Within this framework, courts and the EPA regularly fashion remedies to protect fair competition from violators of the environmental laws.[17]

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[13] The EPA estimates that the cost of compliance with its regulations has risen from $30 billion (0.9 percent of GDP) in 1972, to as much as $185 billion (2.8 percent of GDP) in 2000. *See* Environmental Protection Agency, ENVIRONMENTAL INVESTMENTS: THE COST OF A CLEAN ENVIRONMENT 2-1 (1990) (all figures in 1990 dollars). *See generally* Richard B. Stewart, Symposium, *Environmental Regulation And International Competitiveness*, 102 YALE L.J. 2039, 2062-63 (1993).

[14] *United States v. Mun. Auth.*, 150 F.3d 259, 263-64 (3d Cir. 1998) (internal citation omitted).

[15] For example, the Clean Water Act, 33 U.S.C. § 1319(d) (2001), like other environmental laws, directs that sanctions against violators shall be based, in part, on any economic benefits "resulting from the violation."

[16] Calculation of the Economic Benefit of Noncompliance in EPA's Civil Penalty Enforcement Cases, Notice, 64 Fed. Reg. 32,948 (June 18, 1999). *See also* EPA Science Advisory Board, Notification of Public Advisory Committee Meetings, 66 Fed. Reg. 19,770, 19,771 (Apr. 17, 2001) (identifying types of economic benefits a violator may obtain).

[17] For example, in *Mun. Auth.*, 150 F.3d at 262, a milk processor that made nearly 1,800 illegal discharges of wastewater because it "viewed the concomitant reduction in earnings as too high a price to pay for compliance with the Clean Water Act," was sanctioned with a fine that recouped the ill-gotten gain in order to "achieve the leveling of the playing field intended by Congress." *Id.* at 267. Other courts, in varying contexts, have similarly imposed penalties designed to remove any competitive advantage gained from violating environmental regulations. *See, e.g., United States v. Mac's Muffler Shop, Inc.*, Civ. A. No. C85-138R, 1986 WL 15443, at *10 (N.D. Ga. Nov. 4, 1986) (Clean Air case removing economic benefits of non-compliance); *Chesapeake Bay Found. v. Gwaltney*, 611 F. Supp. 1542, 1558 (E.D. Va. 1985) (same, under Clean Water Act).

Similarly, the EPA will waive a range of civil and criminal penalties for firms that promptly disclose environmental violations pursuant to voluntary self-audits, but the Agency retains "full discretion to recover any economic benefit gained as a result of noncompliance to preserve a 'level playing field' in which violators do not gain a competitive advantage over regulated entities that do comply." EPA: Incentives for Self-Policing: Discovery, Disclosure, Correction, and Prevention of Violations, Notice, 60 Fed. Reg. 66,706, 66,712 (Dec. 22, 1995) (final policy statement).

Other examples of this principle at work appear throughout the federal regulatory regime.[18] The impact on competition from uneven regulatory burdens is even reflected in the history of the Fair Labor Standards Act ("FLSA").[19] First enacted in 1938, this law sought to eliminate price competition based on unacceptable labor conditions by removing from the channels of interstate commerce goods produced by paying wages of less than twenty-five cents an hour, requiring more than forty-four hours of work per week without overtime pay, or utilizing child labor.[20] As originally enacted, however, the FLSA did not apply to a company as a unit, but instead specifically to those employees within a company who were engaged "in commerce or in the production of goods for commerce," as defined in the Act.[21] As a result, the application of the FLSA

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[18] For example, Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), exists to protect consumers from unfair trade practices, but the Federal Trade Commission acknowledges the need for uniform enforcement to prevent injury to competitors as well. *See, e.g.*, Letter from James C. Miller III, FTC Chairman, to the Hon. John D. Dingell, Chairman, U.S. House Committee on Energy and Commerce entitled "FTC Policy Statement on Deception," n.58 (Oct. 14, 1983) (*available at* http://www.ftc.gov/bcp/policystmt/ad-decept.htm). Indeed, in 1992, FTC Chairwoman Janet C. Steiger identified the need to safeguard "truthful competition" through uniform enforcement of the law as a core objective of the Commission's consumer protection program. *See* Press Release, Chairman Steiger Stresses Uniform Law Enforcement to Protect Both Consumers and Competition (Mar. 8, 1992) (*available at* http://www.ftc.gov/opa/predawn/F93/jds-dalla4.htm).

[19] 29 U.S.C. § 201 *et seq.* (2001).

[20] *See* Fair Labor Standards Act of 1938, ch. 676, § 2, 52 Stat. 1060 (1938).

[21] *See id.*

depended on the activities engaged in by particular employees, so that directly competing firms could receive different treatment under the Act depending on the structure of their workforces and their methods of production. A 1944 critique of the Act noted that this unequal coverage allowed the excluded segments of an industry to compete unfairly with those that were subject to the law's requirements.[22] Congress eliminated this unfair anomaly when it subsequently amended the FLSA to extend its provisions uniformly to every "[e]nterprise engaged in commerce or the production of goods in commerce."[23]

As these examples underscore, all branches of government have widely recognized the impact on business competition from uneven regulatory burdens, and they should be avoided absent a clear statutory mandate.

C. The Even Application Of Labor Regulations Is Particularly Significant In Competitive, Labor-Intensive Industries with Low Profit Margins

Price-competitive, labor-intensive industries are particularly at risk from any uneven application of regulatory burdens. Basic rules of economics, again, teach that unequal regulatory burdens will have the most severe impact in highly competitive industries with low entry barriers,

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[22] Harry Weiss, *Economic Coverage of the Fair Labor Standards Act*, 58 Q. J. ECON. 460, 472-73 (1944).

[23] 29 U.S.C. § 203 (2001). Congressional action was required because, unlike the NLRA, the statutory provisions of the FLSA required the disparate treatment. The NLRA, to the contrary, does not exempt employers of undocumented workers from its scope, *see* 29 U.S.C. § 152(3), and Congress has expressed its intent that the law should be applied uniformly to avoid unfair competition.

operating in price-sensitive markets where consumers base purchasing decisions primarily on price. In such industries, small cost variances can spell the difference between a firm's success or failure.

The anti-competitive impact of uneven regulatory burdens will thus be felt with special force in the very industries that typically employ large numbers of immigrants and low-wage workers. These tend to be low-profit industries that are highly competitive and labor-intensive, where low profit margins create huge incentives to gain every possible cost advantage.[24] In these markets, competitors such as *amici*, who play by the rules, will suffer at the hands of those who obtain even a small cost advantage through unequal regulatory burdens.

The garment industry is a typical industry. As the General Accounting Office has observed, the strong

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[24] A Congressional commission in the early 1980's noted that undocumented workers were concentrated in agricultural, textile, service and other low-wage industries. *See Closing the Back Door – The Need for Employer Sanctions, in* STAFF REPORT OF THE SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY 559, 562 (U.S. Immigration Policy & The National Interest Apr. 30, 1981). More recent economic studies show that the largest percentages of immigrants, legal and illegal, work in low-skill jobs in the textile, manufacturing, agriculture, construction, and wholesale and retail trade industries. *See* George J. Borjas, et al., *How Much Do Immigration and Trade Affect Labor Market Outcomes?, in* BROOKINGS PAPERS ON ECONOMIC ACTIVITY, NO. 1, at 9 (Brookings Institute 1997). *See also Statement of Ann L. Combs, Assistant Secretary of Labor for Pension and Welfare Benefits, et al., before U.S. House Subcomm. on Labor, Health and Human Services and Educ., Comm. on Appropriations* (May 23, 2001) (available at http://www.dol.gov/_sec/media/congress/052301workpro.htm) (low-wage industries such as agriculture, garment, healthcare, services, restaurants, and hotels/motels continue to employ immigrants).

incentives to gain even the smallest cost advantage has led some unscrupulous garment employers to skirt the law:

> Regarding economic factors, many of the experts we spoke with [noted] . . . the intense price-competitive dynamics of the garment industry . . . . The low domestic start-up costs allow easy contractor entry, ensuring manufacturers a large number of contractors bidding against each other for work. This competition is further heightened by the ability of retailers and manufacturers to import low-priced garments and the typical presence of an immigrant and primarily undocumented workforce, often with limited employment opportunities.[25]

Similar economic pressures exist in meatpacking and agriculture, which are also low margin, labor-intensive industries facing great pressure to control costs.[26] Like the garment industry, they are also industries where large numbers of undocumented workers are employed,[27] and thus

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[25] U.S. General Accounting Office, GARMENT INDUSTRY: EFFORTS TO ADDRESS THE PREVALENCE AND CONDITIONS OF SWEATSHOPS 9-10 (Nov. 1994).

[26] *See* Alan Barkema, et al., *The New U.S. Meat Industry, in* FEDERAL RESERVE BANK OF KANSAS CITY, ECONOMIC REVIEW 33, 37 (2001) (available at http://www.kc.frb.org/publicat/econrev/PDF/2q01bark.pdf).

[27] The U.S. Department of Labor estimates that thirty-seven percent of all farmworkers in the U.S. are not legally authorized to work in this country. *See* U.S. Department of Labor, A PROFILE OF U.S. FARM WORKERS: DEMOGRAPHICS, HOUSEHOLD COMPOSITION, INCOME, AND USE OF SERVICES 1-5 (1997). The Immigration and Naturalization District Director estimated in 1999 that out of 220 meat packing plants in Iowa and Nebraska, twenty-five percent employ illegal immigrants. *See* Harry Valetk, *"I Cannot Eat Air!":*

(continued...)

industries where any uneven enforcement of the labor laws can create a huge competitive advantage.

The Second Circuit recently recognized these dynamics in a case arising in the building services industry, another price-sensitive sector with a low-wage, largely immigrant workforce. In *Commercial Cleaning Services, LLC v. Colin Service Systems, Inc.*,[28] a Connecticut building services company alleged that a much larger competitor had "obtained a significant business advantage over other firms in the 'highly competitive' and price-sensitive cleaning services industry," by employing undocumented workers at less than the prevailing wage and failing to pay taxes or worker compensation insurance premiums.[29] Writing for the Second Circuit, Judge Leval reversed the district court's dismissal, concluding that the small firm had stated a RICO claim that by "illegally hiring undocumented alien labor, [defendant] was able to hire cheaper labor and compete unfairly . . . underbid[ding] the plaintiffs and tak[ing] business from them."[30]

In short, the adverse consequences for business competition that would follow from a reversal in this case are real and direct. Petitioner argues that reversal is warranted nonetheless because an affirmance would "reward" illegal entry and document fraud, and encourage

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An Economic Analysis of International Immigration Law For The 21st Century, 7 CARDOZO J. INT'L & COMP. L. 141, 164 (1999).

28 --- F.3d ---, 2001 WL 1426953, No. 00-7571 (2d Cir. Nov. 15, 2001).

29 *Id.* at *1.

30 *Id.* at *5.

undocumented workers to stay.[31] As unappealing as this outcome may be (including to *amici* Employer Organizations), the result plainly is the lesser of two evils. However the Court rules, a wrongdoer will benefit: reversal rewards a rogue employer who violated the labor laws, while affirmance benefits an undocumented immigrant who worked in this country illegally. But, only a reversal will cause substantial competitive harm, while affirming the limited backpay remedy approved by the court below will have no similar adverse economic effect.[32]

The rule approved by the D.C. Circuit takes account of the wrongdoing by both sides, and fashions a remedy that effectively balances the equities without absolving either employer or employee. The relief ordered by the court does not include reinstatement to the illegally discharged worker, and grants him only limited back-pay. This is precisely the type of balancing approach this Court has taken in other labor cases, where employers have claimed they should be

31 Pet. Br. at 24-25. *See also* Brief of Amici Curiae Equal Employment Advisory Council et al. at 5-6.

32 Some have argued that affirming the *en banc* decision will encourage future illegal immigration by creating a "windfall" for undocumented workers who conceal their immigration status. *See* Brief of Amici Curiae Equal Employment Advisory Council et al. at 18-19. However, *amici* Employer Organizations are unaware of any evidence that the possibility of earning backpay for wrongful discharge under the NLRA has ever attracted illegal immigrants to America, and find the suggestion fanciful. *Cf. Patel v. Quality Inn South*, 846 F.2d 700, 704 (11th Cir. 1988) ("We doubt, however, that many illegal aliens come to this country to gain the protection of our labor laws. Rather it is the hope of getting a job -- at any wage -- that prompts most illegal aliens to cross our borders"). The "windfall" to employers who avoid backpay liability by hiring undocumented employees, on the other hand, is beyond dispute.

excused from all liability for an illegal discharge because of an employee's own wrongful behavior.

For example, in *McKennon v. Nashville Banner Publ'g Co.*,[33] an employer argued unsuccessfully that its discovery of a worker's past wrongdoing, after the worker had been discharged and sued under a federal anti-discrimination statute, should extinguish all liability for the discharge.[34] Justice Kennedy disagreed on behalf of an unanimous Court, observing that the Court had previously "rejected the unclean hands defense where a private suit serves important public purposes."[35] The Court ultimately held that, in light of "both the deterrence and the compensation objectives" of the employment statute, "[i]t would not accord with this scheme if after-acquired evidence of wrongdoing that would have resulted in termination operates, in every instance, to bar all relief for an earlier violation of the Act."[36] Rather, this Court approved the very after-acquired evidence rule that the Board applied in this case, and which Hoffman now strains to evade.[37]

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[33] 513 U.S. 352 (1995).

[34] *See id.* at 355-56.

[35] *See id.* at 360 (quotations and citation omitted).

[36] *Id.* at 359.

[37] *See id.* at 362-63. *See also ABF Freight Sys., Inc. v. NLRB*, 510 U.S. 317 (1994) (employee's false testimony under oath in NLRB wrongful discharge proceeding does not absolutely bar award of reinstatement with backpay); *see id.* at 325 (Kennedy, J. concurring) (noting that "[o]ur law must not become so caught up in procedural niceties that it fails to sort out simple instances of right from wrong and give some redress for the latter"). *See NLRB v. Apollo Tire Co., Inc.*, 604 F.2d 1180, 1884 (9th Cir. 1979) (Kennedy J., concurring) (enforcing NLRB order that included backpay for wrongfully discharged undocumented worker and explaining that "if the NLRA (continued...)

However distasteful it may seem to award limited backpay to an undocumented worker, the blanket immunity Hoffman seeks would be far more destructive, creating a new incentive to hire undocumented workers that does not currently exist and resulting in unfair business competition to *amici*.

III. FAIR COMPETITION IS A CONGRESSIONAL GOAL OF THE LABOR AND IMMIGRATION LAWS

Reversing the court below would not just be bad for business competition, it would be contrary to the intent of Congress when it crafted the Nation's labor and immigration laws. Congress has made plain its desire to maintain fair business competition through both the NLRA and IRCA, the specific statutes at issue here.

From the earliest days of the NLRA, this Court has underscored that both the public's right and the Board's duty under that Act "extend not only to the prevention of unfair practices by the employer in the future, but to *the prevention of his enjoyment of any advantage he has gained by violation of the Act.*"[38] One of the ways that Congress acted to avoid the potential for any unfair advantages under the NLRA was to impose from the outset a definition of an "employer" subject to the law that does not differentiate those who

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(continued...)
were inapplicable to workers who are illegal aliens, we would leave helpless the very persons who most need protection from exploitative employer practices such as occurred in this case").

[38] *National Licorice Co. v. NLRB*, 309 U.S. 350, 364 (1940) (emphasis added).

employ undocumented workers from others.[39] Congress preserved this uniform application of the NLRA even as it acted to strengthen immigration control by imposing through IRCA separate sanctions on employers who knowingly hire undocumented workers.

In 1986, IRCA made it illegal for employers to "hire . . . an alien knowing the alien is an unauthorized alien."[40] IRCA sought to limit illegal immigration and to protect the domestic labor market, but it did not seek to diminish labor law protections or to create uneven regulatory burdens.[41] Rather, Congress and successive Administrations had been concerned about the deleterious impact on competition that employers who hired undocumented workers caused, and saw IRCA, in part, as necessary to remedy this problem.

Many years of consideration and study preceded the adoption of IRCA. In 1978, Congress created the Select

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[39] *See* 29 U.S.C. § 152(3) (2001) (exempting certain employers from NLRA coverage, not including employers of undocumented workers).

[40] 8 U.S.C. § 1324a(a)(1)(A) (2001).

[41] The legislative history of IRCA reveals that Congress never intended the new sanctions to weaken labor protections:

> It is not the intention of the Committee that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of federal or state labor relations boards, labor standards agencies, or labor arbitrators to remedy unfair labor practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by existing law.

H.R. REP. NO. 99-682, pt. 1, at 58 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5662.

Commission on Immigration and Refugee Policy ("SCIRP") to evaluate strategies that would address the problem of illegal immigration into this country. The impact of illegal immigration on fair business competition was never doubted. Testifying before SCIRP in 1980, one Carter Administration official explained that "employers who comply with statutory labor standards face unfair competition and are forced to compete with firms in the same industry who provide their employees less than the [labor law] requires."[42] The official further noted that employers had obvious economic incentives to hire undocumented workers, because they are typically paid substandard wages and do not complain about instances of economic exploitation due to the fear of detention and deportation.[43] Subsequently, President Reagan appointed the Administration Task Force on Immigration and Refugee Policy, chaired by Attorney General William French Smith, which reviewed the SCIRP recommendations and made recommendations that would form the basis for the Administration's overall immigration policy. In 1981, President Reagan announced an immigration and refugee policy that closely tracked the SCIRP recommendations.[44]

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[42] *Statement of Joe Razo, Director, Concentrated Enforcement Program, Division of Labor Standards Enforcement, U.S. Department of Labor, Before the Select Comm'n on Immigration and Refugee Policy*, at 1-2, Feb. 5, 1980, in STAFF REPORT OF THE SELECT COMM'N ON IMMIGRATION AND REFUGEE POLICY; APP. E, SUPPLEMENT TO THE FINAL REPORT AND RECOMMENDATIONS OF THE SELECT COMM'N ON IMMIGRATION AND REFUGEE POLICY 243 (Apr. 30, 1981).

[43] *Id.*

[44] *See* Bernard D. Reams, Jr. and Mary Ann Nelson, *Immigration Reform And The Simpson-Rodino Act: A Legislative History Of The Immigration Reform And Control Act Of 1986 (P.L. 99-603) With*

(continued...)

IRCA was the legislative response to this situation. It was adopted, *inter alia*, to reduce illegal immigration by eliminating the "magnet" -- employment opportunities for undocumented workers -- that Congress believed attracted many illegal immigrants to the United States.[45] As a Reagan Administration official explained regarding a legislative precursor to IRCA, the Act would protect the welfare of low income workers because "[i]llegal immigration . . . depresses the wages and working conditions of low-skilled workers in this country."[46] Congress shared this goal for IRCA, explaining that the new law would address "both unemployment and less favorable wages and working conditions."[47]

This specific concern for low-wage workers voiced by Congress and the Administration, viewed from the perspective of an employer rather than a worker, is precisely a concern to protect fair business competition. The wages and working conditions of illegal immigrants threaten those of legal workers because law-abiding employers face unfair competition from those who hire illegal workers and then evade the rules governing the terms and conditions of employment. Congress recognized this inescapable fact. As Congressman Dan Lungren explained, rogue employers hire undocumented workers:

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Related Documents And Secondary Sources, 22 INT'L J. LEGAL INFO. 12, 15 (1994).

45 *See* H.R. REP. NO. 99-682(I) (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649.

46 H.R. REP. 98-115 (I) at 96 (Statement of Robert W. Searby, Deputy Under Secretary for Int'l Labor Affairs, Dep't of Labor) (Mar. 16, 1983).

47 S. REP. 99-132 at 5 (1985).

> specifically so that they can exploit them. . . . [This] is unfair to the competitors in those industries, other employers, who follow the law and are undercut in their competitiveness by the fact that those are breaking the law and taking advantage.[48]

Congress sought to prevent such unfair business competition through IRCA in two ways: by imposing sanctions directly on employers who seek to gain an unfair cost advantage through the use of undocumented workers;[49] and, by increasing enforcement of laws governing the workplace, to remove any unfair cost advantage that might otherwise be gained by employers who hire undocumented workers and then disregard the NLRA and other laws governing the workplace.[50] Congress sought to increase labor law enforcement so as "to deter the employment of unauthorized aliens and remove the economic incentive for employers to exploit and use such aliens."[51]

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48 *See* 132 CONG. REC. H10584, H10595 (Oct. 15, 1986) (remarks of Rep. Lungren). Rep. Lungren, the Ranking Member of the Immigration Subcommittee of the House Judiciary Committee, made his comments immediately prior to the final vote on IRCA on October 15, 1986. *See also* NANCY HOMEL MONTWEILER, THE IMMIGRATION REFORM LAW OF 1986, 514 (BNA 1986).

49 *See* 8 U.S.C. § 1324a (2001) (imposing penalties escalating from $250 to $10,000 on any employer who knowingly hires unauthorized workers).

50 *See* Immigration Reform and Control Act of 1986 § 111(d), Pub. L. No. 99-603, 100 Stat. 3359. Section 111(d) appropriated funds to the U.S. Department of Labor to enforce existing labor laws, including the FLSA, and thereby facilitated the Labor Department's pursuit of backpay awards for "unauthorized aliens." *See* 29 U.S.C. § 216(b) (2001).

51 IRCA § 111(d).

The federal regulatory agencies responsible for administering the labor and immigration laws also have recognized that avoiding an unfair competitive impact is one of the congressional objectives underlying these statutes. For example, the Immigration and Naturalization Service ("INS") and the United States Department of Labor, in a 1998 joint memorandum of understanding, recognized that "[l]abor law enforcement . . . helps foster a level competitive playing field for employers who seek to comply with the law."[52] The Equal Employment Opportunity Commission similarly has recognized that the enforcement of antidiscrimination laws against employers of undocumented workers furthers fair business competition.[53]

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[52] Memorandum of Understanding Between the Immigration and Naturalization Service Department of Justice and the Employment Standards Administration Department of Labor, November 23, 1998, *reprinted in* 227 DAILY LAB. REP. E (Nov. 25, 1998). *See also Statement of John R. Fraser, Deputy Administrator Wage and Hour Division Employment Standards Administration U.S. Department of Labor Before the Subcommittee on Immigration and Claims of the House Judiciary Committee* (July 1, 1999) (*available at* http://www.house.gov/judiciary/ fras0701.htm) ("Labor law . . . helps foster a level competitive playing field for employers who seek to comply with the law").

[53] *See EEOC Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws, Number* 915.002, *in* EEOC COMPLIANCE MANUAL § 622, APP. B (Oct. 26, 1999) (exempting employers of undocumented workers from backpay liability under federal anti-discrimination laws would "allow employers to profit from their own wrongdoing"); *id.* at n. 27 (backpay "level[s] the competitive playing field" among businesses) (*quoting A.P.R.A. Fuel Oil Buyers Group, Inc.*, 320 NLRB 408, 414 (1995)). In 1996, President Clinton signed Executive Order 12989, barring employers that knowingly hire illegal immigrants from receiving federal contracts. *See Economy and Efficiency in Government Procurement Through Compliance* (continued...)

Courts, too, have taken into account the congressional intent to promote fair competition, in construing and applying the labor and immigration laws. Indeed, this principle appears in *Sure-Tan, Inc. v NLRB*,[54] which recognized the necessity of applying the NLRA uniformly -- even when undocumented workers are involved -- in order to avoid the adverse impact on competition from undocumented immigrants who would otherwise not be subject to the standard terms of employment. Justice O'Connor observed for the Court in *Sure-Tan:* "If an employer realizes that there will be no advantage under the NLRA in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens is correspondingly lessened."[55] While the Court focused on the impact on the labor market ("acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens"), its reasoning underscores the need for uniform enforcement of the NLRA to avoid incentives for employers to compete unfairly by hiring undocumented workers.[56]

After enactment of IRCA, the Second Circuit similarly looked to the competitive impact to reconcile the provisions of IRCA with those of the NLRA. In *NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*,[57] the court reviewed the legislative histories of both statutes in fashioning a

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with Certain Immigration and Naturalization Act Provisions, 61 Fed. Reg. 6,091 (Feb. 13, 1996) (Exec. Order No. 12,989).

[54] 467 U.S. 883, 893 (1984).

[55] *Id.* at 893.

[56] *Id.* at 892 (quotations and citations omitted).

[57] 134 F.3d 50 (2d Cir. 1997).

remedy that ensures "employers who comply with IRCA do not suffer a competitive disadvantage for their obedience to the law."[58] Other courts have likewise reconciled IRCA and the NLRA in order to achieve the legislative goal of a level competitive playing field, lest "[u]nscrupulous employers . . . be encouraged to hire undocumented workers for the competitive advantage that an environment relatively free of labor safeguards may offer."[59]

The decision of the court below is entirely consistent with these precedents in its efforts to protect fair business competition. *Amici* urge affirmance of the *en banc* decision of the D.C. Circuit, because it properly interprets the provisions of the NLRA and IRCA in a manner that promotes the even application of regulatory burdens. To reverse this result would create economic incentives for shady employers to violate the law, and subject law-abiding companies to the unfair competition that Congress, the courts, and the administrative agencies have consistently sought to avoid.

CONCLUSION

For the foregoing reasons, and in the interest of full and fair business competition, the *en banc* decision of the D.C. Circuit should be affirmed.

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58 *Id.* at 57.

59 *Local 512, Warehouse & Office Workers' Union v. NLRB*, 795 F.2d 705, 718-19 (9th Cir. 1986). *See also Contreras v. Corinthian Vigor Ins. Brokerage, Inc.*, 25 F. Supp. 2d 1053, 1056 (N.D. Ca. 1998) ("permitting employers to circumvent labor laws with regard to undocumented aliens . . . creates an unacceptable economic incentive to hire undocumented workers by permitting employers to underpay them"); *Patel*, 846 F.2d at 704.

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